retain an attorney, our rules will not provide for a reply by the complainant.[863] Any cable operator failing to file and serve a response to a valid complaint may be deemed in default. In such circumstances, an order may be entered against the cable operator finding the rate in question to be unreasonable and mandating appropriate relief.

357. Decision on the Merits. We delegate authority to the staff to adjudicate cable programming service complaints and order appropriate relief. The staff will consider the complaint and the cable operator's response and then make its ruling by written decision. If the staff finds that the rate is unreasonable, it shall grant the complaint and order appropriate relief, including prospective rate reductions and refunds as described below.[864] If the staff finds that the rate in question is not unreasonable, it shall deny the complaint.

358. Administrative Appeals and Judicial Review. As with any staff-level decision, a party may petition the staff to reconsider its decision or may seek review of the staff's decision by the full Commission. Existing procedures governing reconsideration and review will apply to decisions granting or denying a complaint.[865] Final Commission decisions, of course, are subject to judicial review.[866]

359. Ex parte Presentations. The Notice sought comment on the appropriate treatment of ex parte presentations during the complaint process.[867] In particular, the Notice asked

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[863] See Communications Act, § 623(c)(1)(C), 47 U.S.C. § 543(c)(1)(C); Conference Report at 64.

[864] If the cable operator fails in its response to provide data and information sufficient to make the necessary reasonable rate calculation, or data and information necessary to conduct a cost-of-service analysis or evaluate the cable operator's actual equipment cost, the cable operator shall not have carried its burden to demonstrate that the rate in question is reasonable. In such circumstances, the staff may grant the complaint and order appropriate relief.

[865] See 47 C.F.R. §§ 1.106, 1.115 (1992).

[866] 47 U.S.C. § 402(a); 28 U.S.C. § 2344.

[867] An "ex parte presentation" is defined in our rules as follows:

> Any presentation made to decision-making personnel but, in restricted proceedings, any presentation to or from decision-making personnel, which:

if we should adopt relaxed (i.e., "permit but disclose") ex parte rules in order to facilitate staff resolution of a dispute.[868] Several municipalities object to this approach. They assert that as a matter of fairness no ex parte contacts should be allowed because many franchising authorities and subscribers, unlike cable operators, may not have the benefit of legal representation in the District of Columbia. These parties believe that all communications between the Commission and a party, including requests for comments or information, should be done by mail and served on all parties.[869]

360. We are persuaded that our proposal to apply relaxed ex parte rules to cable programming service complaints might disadvantage complainants, especially subscribers and small franchising authorities, who do not have the benefit of counsel in Washington, D.C. "Permit but disclose" procedures might unintentionally place cable operators, who typically retain counsel to represent them before the Commission and monitor ongoing FCC proceedings, in a more favorable position than complainants who do not have the benefit of such representation. Thus, such procedures might not be consistent with congressional intent that we establish "fair and expeditious" procedures[870] that do not require complainants "to retain the services of a lawyer... ."[871] Therefore, we will not adopt this approach.

361. Rather, we shall apply our existing ex parte rules concerning adjudicative proceedings. Cable programming service rate complaints, which all "involve[ ] the determination of rights and responsibilities of specific parties," are

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(1) If written, is not served on the parties to the proceeding, or

(2) If oral, is made without advance notice to the parties to the proceedings and without opportunity for them to be present.

47 C.F.R. § 1.1202(b) (1992) (emphasis in original).

[868] Notice, 8 FCC Rcd at 534, para. 109.

[869] See Miami Comments at 20; Monroe Comments at 8. Two cable operators support application of relaxed ex parte rules until the Commission determines that a material fact is in dispute and formal hearing procedures are therefore necessary. Cox at Comments 74; CIC Comments at 76-77.

[870] Cable Act, § 623(c)(1)(B), 47 U.S.C. § 543(c)(1)(B).

[871] Conference Report at 64.

adjudicative proceedings under our rules.[872] Such adjudicative proceedings are classified as "restricted proceedings" for ex parte purposes from the date of filing of a formal opposition or a formal complaint.[873] We believe cable programming service rate complaints are best categorized as informal complaints.[874] Accordingly, these proceedings will become restricted once a formal opposition is filed by the cable operator. From that point forward, as with all restricted adjudications, ex parte presentations will be prohibited.[875]

362. We note that our existing rules exempt from this general prohibition any presentation "requested by the Commission or staff for the clarification or adduction of evidence or for resolution of issues, [if] the proceeding is a restricted proceeding which has not been designated for hearing... ."[876] This exemption provides the staff flexibility to contact any party to request additional information necessary to resolve the complaint. At the same time, because the response to any such inquiries must be served on the other parties, no other parties are placed at a disadvantage.[877]

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[872] 47 C.F.R. § 1.1202(d) (1992).

[873] 47 C.F.R. § 1.1208(c)(1)(i)(B), (ii)(A) (1992). See also 47 C.F.R. § 1.1202(e) (1992) (defining "formal opposition or formal complaint").

[874] Congress's express rejection of a prima facie case pleading requirement appears to indicate a desire for some degree of informality in the complaint process. See Conference Report at 64.

[875] 47 C.F.R. § 1.1208(a) (1992). We note that a cable operator intending to file a formal opposition may not make any ex parte presentations before doing so; nor may a cable operator that chooses to file an informal opposition make any oral ex parte presentations. See 47 C.F.R. §§ 1.1204(a)(2)(ii) Note; 1.1208(b)(2) (1992).

[876] 47 C.F.R. § 1.1204(b)(7) (1992).

[877] The rule requires that "any new written information elicited from such a request and a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding." 47 C.F.R. § 1.1204 Note (1992). Thus, for instance, if the staff contacted a cable operator to obtain additional information to resolve the dispute, the cable operator would be required to serve on the complainant any new information not already reflected in the record. This service requirement ensures that the complainant will be fully apprised of any new information provided to the Commission by the cable operator resulting from communications initiated by the Commission or the

363. We recognize that a potential exists for the filing of hundreds or even thousands of complaints relating to a single cable system's rates. Such complaints are likely to come from subscribers who are unrepresented by counsel and it may not be immediately evident how much consolidation of these complaints is going to take place. In these circumstances literal compliance with the ex parte rules, i.e., the requirement that each complainant be served with each pleading or decision document, may become extremely burdensome for the system operator, the Commission and the complainants. In such circumstances, it may be necessary for the Commission or the staff to apply special procedures.

364. Proprietary Information. The Notice sought comment on how to treat information necessary to adjudicate a cable programming service rate complaint, but which the cable operator regards as proprietary. In particular, the Notice asked if our existing rules governing confidential business information are adequate and sufficiently flexible in the context of cable programming service rate disputes. We also invited comment on procedures that would provide parties to complaints limited access to proprietary information, and we asked commenters to identify specific types of information that likely would be considered proprietary by cable operators.[878] These questions generated a relatively meager record. The few cable operators who commented on this issue assert generally that protection for proprietary material must be provided,[879] although only one operator identified any specific information it deems proprietary.[880] Municipalities and consumer/public interest advocates generally believe that the Commission should provide for the fullest possible disclosure of information necessary to resolve a complaint and generally believe the Commission's existing rules are adequate.[881]

365. We will employ our existing rules and procedures regarding information submitted to the Commission in the cable programming service complaint process. Such information will be considered routinely available for public inspection absent a cable operator's request for confidential treatment pursuant to

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staff.

[878] Notice, 8 FCC Rcd at 533, para. 106.

[879] See Cole Comments at 44; Continental Reply at 26.

[880] Nationwide Comments at 3, 4 (subscriber numbers necessary for a finding on effective competition).

[881] See CFA Comments at 113; CFA Reply at 73-74; Austin Comments at 65; Miami Comments at 19; Fairfax Reply at 21.

Section 0.459 of the rules.[882] We will employ our existing requirement that places the burden on the person requesting confidential treatment to demonstrate by a preponderance of the evidence that nondisclosure is consistent with the provisions of the Freedom of Information Act ("FOIA").[883] Exemption 4 of the FOIA authorizes the Commission to withhold from public inspection, inter alia, confidential commercial or financial information.[884] We decline to adopt formal rules at this time regarding limited access for parties to information submitted by the cable operator that the Commission has determined to be confidential within the meaning of Exemption 4. Should this situation arise in a particular complaint, at least initially, we will consider offering parties such limited access.

366. Alternative Dispute Resolution. The Notice also sought comment on the possible use of alternative dispute resolution procedures by consenting parties.[885] One commenter

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[882] 47 C.F.R. § 0.459 (1992). Accordingly, we are amending Section 0.455 of the rules, 47 C.F.R. § 0.455 (1992), to add to the list of records with are routinely available for public inspection complaints against cable operators concerning cable programming service and equipment rates, where no request for confidentiality has been made.

[883] See 47 C.F.R. § 0.459(d) (1992). We reject the contention of two commenters that the burden should be placed on the complaining party to prove that disclosure would result in no competitive injury to the cable operator. See Cox Comments at 76; CIC Comments at 78-79. Not only would such a requirement be inconsistent with the FOIA, but the cable operator is in the best position to know the extent to which it faces competitive pressures in the marketplace and the potential for competitive injury if the information is disclosed. Therefore, we believe that, as provided under existing rules implementing the FOIA, the burden appropriately should be on the cable operator to demonstrate that disclosure will likely result in competitive harm.

[884] 5 U.S.C. § 552(b)(4). See 47 C.F.R. § 0.457(d) (1992) (Commission's rule implementing Exemption 4). Information is deemed "confidential" within the meaning of Exemption 4 if it satisfies certain judicially-approved criteria. See Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 61 U.S.L.W. 3647 (U.S. Mar. 23, 1993) (No. 92-1043);National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The Commission's rules also authorize public disclosure of such confidential information for "persuasive" reasons. See 47 C.F.R. §§ 0.547(d)(1); 0.461(f)(4) (1992).

[885] Notice, 8 FCC Rcd at 534, para. 109.

responded by advocating rate arbitration as a means to reduce administrative burdens on all parties.[886]

367. We have committed ourselves to use alternative dispute resolution techniques to expedite and improve our administrative process whenever feasible and consistent with our statutory mandate.[887] Parties wishing to employ alternative dispute resolution in the cable programming service context in lieu of adjudication of a complaint by the Commission may contact our staff. We will hold in abeyance any complaint in which the parties actively are exploring alternative dispute resolution in lieu of Commission adjudication.[888]

(2) Remedial and Enforcement Procedures for Rates Found to Be Unreasonable

i. Background

368. The Cable Act directs us to establish procedures to reduce rates for cable programming service that we have determined to be unreasonable, as well as procedures governing refunds to subscribers of the unreasonable portion of such rates paid after the filing of a complaint.[889] In the Notice, we invited comment on our tentative conclusion that the Cable Act, at a minimum, authorizes us prospectively to reduce unreasonable rates.[890] We also asked parties to comment on whether our

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[886] LeBoeuf Comments at 3-7.

[887] See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, 6 FCC Rcd 5669 (1991).

[888] Persons seeking information regarding the use of alternative dispute resolution may contact the Commission's Designated ADR Specialist, ADR Program, Office of the General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554, Telephone (202) 632-6990, Telefax (202) 632-0149.

[889] Communications Act, § 623(c)(1)(C), 47 U.S.C. § 543(c)(1)(C).

[890] We use the term "prospective rate reduction" to refer to a rate decrease imposed after a finding of unreasonableness that is designed to prevent subscribers from continuing to bear the unreasonable portion of that rate in the future. A prospective rate reduction would not return unreasonable amounts paid by subscribers prior to the prospective rate reduction. These amounts would be addressed by means of a refund. We use the term "refund" to refer to a procedure which returns to subscribers unreasonable

authority under the Cable Act to order prospective rate reductions extends to prescription of specific rates. In addition, the Notice requested comment on our tentative conclusion that the Cable Act authorizes us to refund to subscribers that portion of such rates found to be unreasonable that subscribers paid after the filing of a complaint. The Notice also sought comment on the appropriate means to effect refunds, such as direct refunds to actual subscribers who paid the overage, or, alternatively, prospective percentage reductions in the unreasonable service rate to the class of subscribers that bore the unreasonable charge. Finally, the Notice sought comment on requiring a cable operator whose rates we have found to be unreasonable to certify that it has implemented all remedial measures outlined in our decision, such as rate reductions and/or refunds, with noncomplying operators subject to possible monetary forfeitures.[891]

ii. Comments

369. The comments, either explicitly or by implication, support our tentative conclusion that we may order prospective rate reductions for those cable programming service rates found to be unreasonable.[892] Further, two commenters suggest that the Commission may prescribe specific rates.[893] Certain cable operators take issue with our tentative conclusion that remedial relief should be implemented within 30 days of a Commission determination that the rate is unreasonable. They suggest, instead, a longer implementation period, such as 60 days, to better accommodate standard billing cycles.[894] Moreover, several cable operators contend that the operator

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amounts paid after the date a complaint was filed up to the point the cable operator implements a prospective rate reduction.

[891] Notice, 8 FCC Rcd at 533-34, paras. 107-108.

[892] See, e.g., Cole Comments at 44 (Commission should enforce its rate determinations by, inter alia, ordering prospective relief); Nashoba Comments at 108 (operator should have discretion to add additional services as an alternative to reducing rates); NATOA Comments at 75 (cable operators should have 30 days to reduce rates).

[893] CFA Comments at 145 & n.154; NATOA Comments at 75.

[894] Cox Comments at 79; CIC Comments at 82; Cole Comments at 44.

should have the discretion to add services as an alternative to reducing rates.[895]

370. With respect to our refund authority, the comments support the interpretation proposed in the Notice that Section 623(c)(1)(C) permits us to order refunds for the unreasonable portion of rates paid by subscribers after the date a complaint was filed.[896] Municipalities generally favor a requirement that cable operators issue refunds to actual subscribers who paid the overcharges.[897] CFA also prefers refunds to those subscribers actually overcharged, but suggests that, if this approach proves too burdensome, the Commission could require a reduction in rates to the entire class of current subscribers equal to the overcharges.[898] Cable operators ask us to recognize that refunds to the actual subscribers who paid the overages would be unreasonably burdensome and administratively infeasible. They overwhelmingly urge the Commission to adopt refund procedures that permit prospective compensatory rate reductions to the class of subscribers that paid the unreasonable rate.[899]

iii. Discussion

371. Prospective Rate Reductions. We affirm our tentative conclusion that Section 623(c)(1)(C) authorizes us prospectively to reduce an unreasonable rate for cable programming service in order to protect subscribers from continuing to bear that excessive rate in the future. Accordingly, upon a finding that a rate is unreasonable when judged against the criteria described above, we shall order the cable operator to reduce the rate to a specific reasonable level

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[895] Nashoba Comments at 108 (consistent with congressional policy to enhance diversity of programming); NCTA Comments at 77 (operator should be permitted to reconfigure its tiers to reach the benchmark level); Cole Comments at 44.

[896] See CFA Comments at 145 (Commission cannot order the refund of amounts paid prior to the date of the filing of a complaint); Blade Comments at 12 (refunds should be limited to period following filing of complaint); NCTA Comments at 76 (no authority in the Act for ordering refunds prior to the filing of a complaint); Cole Comments at 44; NATOA Comments at 75.

[897] See, e.g., Austin Comments at 66; NATOA Comments at 75-76.

[898] CFA Reply at 81-82; CFA Comments at 145-146.

[899] See Cole Comments at 44; Cox Comments at 80; CIC Comments at 82; Falcon Comments at 66-67; Nashoba Comments at 108-109; NCTA Comments at 77; TCI Comments at 60; Cablevision Reply at 54.

and to reflect the reduced rate in prospective bills to customers. Generally, the rate we specify as reasonable will be the permitted rate calculated pursuant to the formula described above. In individual circumstances where the cable operator provides cost-of-service data that demonstrate that a rate above the otherwise permitted level (but below the disputed rate) is reasonable and justified, we will specify a reasonable rate in excess of the permitted rate to effectuate the prospective rate reduction. Conversely, if the operator's cost-of-service showing indicates that a rate below the permitted rate is reasonable, we will designate that rate for purposes of implementing a prospective rate reduction. By rule, our decision requiring a prospective rate reduction shall remain binding on the cable operator for one year unless we designate a different time period in the order mandating the reduction or waive the one year requirement in individual circumstances.[900]

372. To the extent the Commission designates a specific, reasonable rate to be charged in the future, this in effect would be a rate prescription. We agree with several commenters that our authority pursuant to Section 623(c)(1)(C) to adopt "procedures to be used to reduce [unreasonable] rates for cable programming services" extends to the prescription of specific rates.[901] As CFA notes, absent the power to reduce rates to a specific level by prescribing a specific rate, our statutory refund authority under Section 623(c)(1)(C) would be null.[902] This is so because refunds to subscribers cannot be calculated without reference to a specific, reasonable rate for the cable programming service at issue.

373. Finally, we reject suggestions by some commenters that cable operators should be afforded discretion to increase service after a finding that its rates are unreasonable in lieu of reducing those rates.[903] These commenters have not demonstrated how such an approach would provide value equivalent to that of monetary rate reductions. In addition to the impracticability of evaluating the value of proposed added

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[900] In the event changed circumstances render continued applicability of the designated rate inappropriate during the full time period specified by the rule, a cable operator may seek waiver of the one year requirement pursuant to 47 C.F.R. § 1.3 (1992).

[901] See CFA Comments at 145; NATOA Comments at 75.

[902] CFA Comments at 145 n.154.

[903] See Nashoba Comments at 108; Cole Comments at 44; NCTA Comments at 77. CFA opposes permitting cable operators to add programming to reach a reasonable level. CFA Reply at 81-82.

services, such an approach would create unnecessary administrative difficulties.

374. Refunds. We shall also require the cable operator to refund overcharges to subscribers pursuant to Section 623(c)(1)(C) in order to make subscribers whole. The cumulative refund shall be calculated from the date a valid complaint was filed until the date the cable operator implements the reduced rate prospectively in bills to subscribers.[904] We agree with CFA and others that Section 623(c)(1)(C) does not contemplate refunds for rates paid prior to the date a complaint is filed with the Commission.[905] In most situations, the refund shall be equal to the difference between the disputed rate charged by the cable operator and the reasonable rate determined by the Commission. As noted above, the reasonable rate may be either the permitted rate calculated according to the Commission's formula or some higher or lower rate justified by a cable operator's cost of service showing.

375. We note one exception to this general approach to calculating refunds. As discussed previously, the statute affords complainants a 180 day period to challenge cable programming service rates existing as of the effective date of our rules.[906] Should a cable operator's existing rate go unchallenged during this 180 day period, Section 623(c)(3) bars complaints against that rate thereafter unless the cable operator subsequently raises its rate. Should we receive a complaint in these circumstances challenging a subsequent rate increase (and the operator's existing rate as of the effective date of our rules was not challenged), a question arises whether our remedial

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[904] In circumstances where an original complaint is dismissed without prejudice for failure to meet the minimum showing requirement discussed above, refund liability would accrue from the date the Commission receives a valid, revised complaint which makes the requisite minimum showing.

[905] See CFA Comments at 145; Blade Comments at 12; Cole Comments at 44; NCTA Comments at 76; NATOA Comments at 75. We cannot accept NJ's unsupported view that price rollbacks and refunds for unreasonable cable programming service rates should be effective December 5, 1992. NJ Comments at 21. The significance of this date for purposes of implementation of the rate regulation provisions of the Cable Act is not apparent. In any event, the Cable Act explicitly provides for refunds for unreasonable rates that were paid by subscribers "after the filing of [a] complaint," and complaints regarding existing rates or subsequent rate changes may be filed only after our rules take effect. Communications Act, § 623(c)(1)(C), (3), 47 U.S.C. § 543(c)(1)(C), (3).

[906] See Communications Act, § 623(c)(3), 47 U.S.C. § 543(c)(3).

measures may address the operator's entire rate or simply that component of the disputed rate that represents an increase above the operator's previous, unchallenged rate. The limitation of Section 623(c)(3) appears to preclude refund of any charges below the operator's rate in existence as of the effective date of our rules. Therefore, for purposes of calculating any refund, we will employ a modified approach in these circumstances in light of Section 623(c)(3). Thus, if we conclude that the operator's disputed rate increase is unreasonable, the refund shall be no greater than the difference between the operator's disputed rate and its (unchallenged) rate in existence as of the effective date of our rules.[907] As with all refunds for cable programming service rates, the refund liability will extend from the date a valid complaint is filed with the Commission.

376. In circumstances where the cable operator can, without undue administrative difficulty or unreasonable burden, identify actual subscribers who paid the unreasonable charge, we encourage the operator to do so, by refunding the overage directly to those subscribers either through direct payment or as a specifically identified credit to the subscribers' bill. To the extent refunds to actual subscribers who paid the overage is practicable, we believe that this is the preferred approach. As we recognized in the Notice, however, and as the comments from cable operators confirm, it may be difficult or impossible in many circumstances to identify with precision and to locate those actual subscribers who paid the overage.[908] Cable operators face constant changes in their subscriber base. Customers who subscribed to the service in question during all or part of the time the unreasonable rate was charged subsequently may have discontinued service and moved to another location. New subscribers who did not take service during the period at issue further complicate the process of identifying who properly is to receive a refund. The expense associated with identifying the exact parties eligible for a refund might well be disproportionately large in comparison to the individual refunds

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[907] This exception will not apply to prospective rate reductions. Thus, if we conclude that an operator's subsequent rate increase is unreasonable (but its existing rate as of the effective date of our rules was not challenged), we will employ our standard procedures for designating a reasonable rate that the cable operator must charge on a prospective basis. Because of the prospective nature of this remedy, Section 623(c)(3) does not preclude designation of a reasonable, prospective rate below the cable operator's existing rate as of the effective date of our rules.

[908] See Cole Comments at 44; Cox Comments at 80; CIC Comments at 82; Falcon Comments at 66-67; Nashoba at Comments 108-109; NCTA Comments at 77; TCI Comments at 60; Cablevision Reply at 54.

themselves. Accordingly, we shall grant the cable operator the option of implementing the refund by means of a prospective percentage reduction in the unreasonable service rate to cover the cumulative overcharge. This reduction will be reflected as a specifically identified one-time credit on prospective bills to the class of subscribers that had been unjustly charged.[909] However, to the extent an overcharge is associated with a separately priced tier of service, refunds should be made to the class of subscribers who receive that service.

377. Implementation. The cable operator will be required to implement any reduction in rates or refunds within 60 days from the date the Commission releases an order finding the contested rate to be unreasonable and mandating a remedy. We are persuaded that a 60-day time period to implement remedial measures will better accommodate standard billing cycles than the 30 day period we proposed in the Notice, thus preventing undue burdens on operators -- without adversely affecting subscribers.[910] Any unreasonable charges paid by customers after the filing of a complaint but prior to receiving a bill reflecting the reduced rate will be included in the calculation of refunds. In order to make subscribers whole, refunds shall include interest computed at the applicable published Internal Revenue Service rates for tax refunds and additional tax payments.[911] Interest shall accrue from the date the complaint is filed until the refund issues. We also affirm our tentative conclusion that Section 623(c) permits us to reduce rates and order refunds for the class of subscribers that paid unreasonable rates for a particular service, even if our determination with respect to a particular service rate was based upon a complaint

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[909] Cable operators may seek waiver of the one-time credit requirement for good cause shown, such as when the refund liability is so large that implementation of the refund through one-time credits would impair the operator's ability to provide service. See 47 C.F.R. § 1.3 (1992). In such circumstances, we will consider permitting the operator to implement the refund by spreading the credits to subscribers over a period of several billing cycles.

[910] See Cox Comments at 79; CIC Comments at 82; Cole Comments at 44.

[911] See, e.g., MCI Telecommunications Corporation v. Pacific Bell, et al., Memorandum Opinion and Order, 8 FCC Rcd 1517, 1530, para. 48 & n.124 (1993) (complaint against common carriers filed pursuant to 47 U.S.C. § 208); Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company, Order, 8 FCC Rcd 373, 375, paras. 18, 19 (Com.Car.Bur. 1993) (pole attachment complaint against utility filed pursuant to 47 U.S.C. § 224).

filed by a single consumer.[912] A rate determined to be unreasonable when paid by an individual subscriber also is unreasonable with respect to all others subscribing to the same service. Seriatim decisions of unreasonableness as to individual subscribers are not only unnecessary, but would make implementation of Section 623(c) administratively infeasible.[913]

378. Review. We decline invitations by some cable operators to adopt an approach that would, in effect, automatically stay the effectiveness of rate reductions or refund requirements until all appeals of rate decisions are exhausted.[914] This approach might invite frivolous litigation from cable operators and needlessly delay relief to subscribers in situations where a cable operator's challenge to the Commission's rate determination lacked merit. Rather, we shall employ our existing procedures whereby the staff, acting on delegated authority, or the Commission may stay remedial requirements pending disposition of a petition for reconsideration or an application for review.[915] Cable operators, of course, may petition the Commission for a stay of remedial requirements. Such requests will be evaluated under well-established, judicially-approved standards.[916]

379. Enforcement. We adopt our proposed requirement that cable operators must certify their compliance with Commission orders requiring prospective rate reductions, refunds or other remedial relief to subscribers. No party opposes this proposal, and we agree with CFA that a certification procedure will reduce the burdens on all parties of monitoring a cable operator's compliance with our orders.[917] This certification shall be signed by an authorized representative of the cable

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[912] See Notice, 8 FCC Rcd at 534, para. 108; CFA Comments at 146 (concurring in this view).

[913] Thus, SBA's suggestions about how to handle complaints regarding previously adjudicated rates are moot. SBA Comments at 21-22.

[914] See Cox Comments at 79; CIC Comments at 82 (rate reductions should only be required after an appeal of a decision that a rate is unreasonable is final and is not subject to further review).

[915] See 47 C.F.R. § 1.102(b)(2), (3) (1992).

[916] See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

[917] See CFA Comments at 146. See also Commerce Comments at 4 (supporting certification requirement).

operator, shall reference the applicable Commission order, and shall state that the cable operator has complied fully with all provisions of that order. The certification shall also include a description of the precise measures the operator has taken to implement the remedies ordered by the Commission. The cable operator must file this certification with the Commission within 90 days of the release date of the order requiring remedial relief.[918]

380. As with any entity subject to FCC jurisdiction that fails to comply with a Commission rule or any provision of a Commission order, cable operators that fail to effect cable programming service rate reductions, refunds or other remedial measures mandated by the Commission will be subject to enforcement action. Such enforcement action may include, for example, monetary forfeitures pursuant to Section 503(b) of the Communications Act.[919] We will not impose forfeitures on a cable operator simply because a rate for cable programming service is found to be unreasonable.[920] We believe that the rate reduction and refund procedures we adopt herein provide adequate deterrence to violation of our rate regulations.[921] We will, however, exercise our forfeiture authority in those circumstances where a cable operator fails to comply with remedial requirements imposed by order after a finding of unreasonable cable programming service rates.[922] We cannot accept Cole's argument that

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[918] As noted above, cable operators must implement prospective rate reductions and refunds within 60 days of the release date of the Commission's order.

[919] 47 U.S.C. § 503(b). A cable operator that fails to comply with a Commission rule or order is subject to a forfeiture of up to $25,000 for each violation or each day of a continuing violation. The maximum forfeiture penalty for a continuing violation is $250,000. 47 U.S.C. § 503(b)(2).

[920] See House Report at 88 ("A finding that rates are unreasonable is not deemed a violation of law subject to the penalties and forfeitures of the Communications Act."). Of course, forfeitures may be imposed for violations of specific rules or statutory provisions.

[921] Moreover, the Cable Act provides that we establish procedures to reduce rates and order refunds, but does not appear to contemplate additional penalties for cable operators charging unreasonable rates.

[922] See Cablevision Reply at 54 (fines should be imposed only when operator fails to comply with a Commission determination); CFA at 146 (supports Commission's tentative conclusion that cable operators who fail to comply with relief ordered by Commission are

forfeitures would be "unduly harsh" given the uncertainty likely to surround rate regulation for the foreseeable future.[923] To the contrary, we believe that exercise of our forfeiture authority consistent with Section 503(b) of the Communications Act, and in the specific circumstances described above, is appropriate and necessary to effective implementation of the statutory scheme. Moreover, as CFA notes, there is no indication in the 1992 Cable Act or its legislative history that Congress intended to exempt cable operators from the Commission's existing forfeiture powers.[924]

381. Finally, we note that several municipalities urge the Commission to permit local franchising authorities to enforce the Commission's cable programming service rules through refunds and rate rollbacks.[925] As discussed above, however, the statutory provisions governing cable programming service rate complaints -- in contrast to the provisions governing basic service tier rates -- do not contemplate a formal role for local franchising authorities. Accordingly, although we will appreciate any informal assistance from local authorities, the statute does not authorize us to give local authorities any formal powers over implementation and enforcement of our cable programming service rate regulations.

c. Regulations Governing Rates

(1) Statutory Standards

i. Background.

382. Section 623(c) of the Communications Act requires the Commission to establish criteria for identifying, in individual cases, rates for cable programming services that are

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subject to forfeiture). CFA also suggests that the Commission should institute forfeiture proceedings against cable operators who fail to respond to complaints, inquiries and information requests within a reasonable time. CFA Comments at 141. In this regard, we will consider exercising our forfeiture authority in circumstances where the cable operator's failure to respond is willful and repeated. See 47 U.S.C. § 503(b)(1).

[923] See Cole Comments at 44.

[924] See CFA Comments at 146.

[925] Municipal Comments at 22; Palm Desert Comments at 3; NATOA Reply at 5.

unreasonable.[926] The Commission, in establishing such criteria, must consider the following factors:

> (A) rates for similarly situated systems taking into account similarities in costs and other relevant factors;
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> (B) rates of systems subject to effective competition;
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> (C) the history of rates for the system including their relationship to changes in general consumer prices;
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> (D) the system's rates as a whole for all cable programming, cable equipment and cable services provided by the system, other than programming provided on a per channel or per program basis;
>
> (E) capital and operating costs of the system; and
>
> (F) advertising revenues.[927]

The Cable Act of 1992 also permits the Commission to consider other relevant factors for determining what constitutes unreasonable rates for cable programming services.[928]

383. In the Notice we tentatively concluded that the intent of the Cable Act of 1992 is "for the Commission to establish criteria to govern the determination in an individual case of whether rates for cable programming services are unreasonable" based upon a reasoned balancing of the factors enumerated above and other factors that the Commission in its discretion may choose to consider.[929] We also tentatively concluded that the Commission is granted, under the Cable Act of 1992, substantial flexibility in establishing these criteria.[930]

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[926] Notice, 8 FCC Rcd at 530, para. 90 citing Communications Act § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A).

[927] Notice, 8 FCC Rcd at 530, para. 90; and Communications Act § 623(c)(2), 47 U.S.C. § 543(c)(2).

[928] Notice, 8 FCC Rcd at 530, para. 90 citing Communications Act § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A).

[929] Notice, 8 FCC Rcd at 530, para. 91.

[930] Notice, 8 FCC Rcd at 530, para. 91.

The Notice observed that while the Cable Act of 1992 requires the Commission to "establish regulations that assure rates for the basic service tier are reasonable," for programming services, the Act directs the Commission to establish standards that permit identification in individual cases of rates that are "unreasonable."[931] The Notice asked if this differing language required that we adopt a different standard of reasonableness for basic service tier rates and for cable programming services rates. We then asked for comment on "whether our regulations identifying unreasonable cable programming service rates, will necessarily define the 'reasonable' rates for such services," and "whether Congress instead intended more of an egregious standard for cable programming services than for basic tier rates."[932]

ii. Comments.

384. The majority of the parties agree with our tentative conclusion in the Notice that the intent of Section 623(c) of the Communications Act is for the Commission to establish criteria to govern the determination, in individual cases, of whether rates for cable programming services are reasonable based upon a reasoned balancing of the factors enumerated in Section 623(c)(2) and other factors that the Commission in its discretion chooses to consider.[933]

385. Cable operators assert, however, that the Cable Act of 1992 establishes a different substantive standard for the rate regulation of cable programming services than for the basic service tier.[934] They contend that Congress, in Section 623(c) of the Communications Act, bestowed upon the Commission primarily an oversight role in regulating rates for cable programming services.[935] Cable operators thus argue that Congress intended that the rate regulation provisions of the Cable Act of 1992 governing cable programming services should be applied only to

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[931] Notice, 8 FCC Rcd at 530, n.127.

[932] Notice, 8 FCC Rcd at 530, n.127.

[933] Notice, at 531, para. 91. See, e.g. Newhouse Comments at 40-42; Continental Comments at 53; AdelphiaII Comments at 97; Nashoba Comments at 96; AEN Comments at 15; USA Comments at 13.

[934] See, e.g. Comcast Comments at 5; Continental Comments at 52; InterMedia Comments at 30; Nashoba Comments at 95-96; AdelphiaII Comments at 96-97; Newhouse Comments at 38-41; TimeWarner Comments at 4 and 38.

[935] See, e.g. NCC Comments at 27; CIC Reply Comments at 55-56.

cable systems that exhibit egregious conduct.[936] They assert that Congress only intended to regulate rates for cable programming services as a fail-safe mechanism to rein in renegade cable operators charging rates far above the industry average.[937] As TimeWarner explains, Congress intended for the Commission to only target the two to five percent of cable systems that are "renegades."[938] Therefore, they assert, the cable programming service rate regulation provisions may apply only to the "bad actors" among cable system operators, as opposed to the more encompassing regulation of basic service rates.[939]

386. Other commenters contend that the terms "reasonable" and "unreasonable," as found in the Cable Act of 1992, do not have different substantive meanings.[940] According to Austin, the reasonable and not unreasonable standards mandate the same regulatory treatment of rates for basic and cable programming services.[941] They maintain that the Commission is required to regulate cable programming service rates under the same reasonableness standard that is mandated for basic service in the Cable Act of 1992.[942] These commenters thus contest the conclusion of commenting cable operators that Congress intended a bad actor standard to apply to the regulation of rates for cable programming service.[943] NYConsumers argues that the legislative history of the Cable Act of 1992 does not support the conclusion that an "egregious" standard applies for the regulation of cable

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[936] See, e.g. Blade Comments at 8; Comcast Comments at 32-33 and 38; CATA Comments at 5; NCTA Comments at 5, 55 and Attachment at 17; TimeWarner Comments at 40-41.

[937] See, e.g. AdelphiaII Reply Comments at 56; see also TimeWarner Reply Comments at 41.

[938] TimeWarner Comments at 43 and Attachment at 38; see, e.g. Continental Comments at 52; NCTA Comments at 59.

[939] See, e.g. AdelphiaII Comments at 99-100; Blade Comments at 8; Cole Comments at 39-40; Comcast Comments at 32-33 and 38; Continental Comments at 2; Nashoba Comments at 98-99; Newhouse Comments at 37-39; TCI Comments at 6 and 27; CIC Reply Comments at 20; Continental Reply Comments at 30-31; Cole Reply Comments at 30.

[940] See, e.g. CFA Comments at 80-83; NATOA Comments at 71; Schaumberg Comments at 7 and 10.

[941] See, e.g. Austin Reply Comments at 6.

[942] See, e.g. Austin Reply Comments at 7; CFA Reply Comments at 5-6.

[943] See, e.g. NATOA Comments at 70-71.

programming services rates.[944] These parties argue that targeting only two to five percent of the highest price cable systems, as suggested by NCTA, would fail to fulfill the mandate of the Cable Act of 1992.[945]

iii. Discussion.

387. We conclude, as for the basic service tier, that our standards for identifying cable programming services rates that are unreasonable in individual instances will comply with the statute if our standards reflect a reasoned balancing of the statutory factors, and if we adequately explain how our standards reflect these statutory factors. We also find that, although not mandated by the statute, we should give primary weight to the rates of systems subject to effective competition. This will address congressional concerns that rates of systems not subject to effective competition reflect undue market power.[946]

388. We further find that a "bad actor" standard for rates for cable programming services would not fulfill the mandate of the statute. First, given the congressional concern that rates for cable programming services may be high, we are not persuaded that Congress mandated a more lenient standard for

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[944] NYConsumers Comments at 13; see, e.g. Austin Reply Comments at 7; Hollywood Reply Comments at 5-6; NATOA Reply Comments at 18; CFA Reply Comments at 5; Hollywood Reply Comments at 5-6; NYNEX Reply Comments at 10.

[945] See, e.g. BellAtlantic Reply Comments at 2-3.

[946] The Cable Act of 1992 requires that we consider the rates of systems subject to effective competition in fashioning regulations governing rates for cable programming services. Our regulations consider this factor by adoption of a formula that calculates a competitive benchmark for a given system. Under this formula, the benchmark rate level applicable to a system is based on the rates of systems operating in competitive markets with a similar number of channels, subscribers, and satellite-delivered channels. Thus, use of the benchmark to determine initial regulated rate levels effectively addresses the statutory factor of the rates of similarly situated systems. We have additionally addressed other system characteristics that could be incorporated into the benchmark in connection with our requirements for the basic service tier. Those determinations are equally applicable for design of the benchmark as applied to cable programming services. While the benchmark is not directly cost-based, our survey was based on an analysis of cable rates that presumptively recovered costs. Thus, our requirements for cable programming services take into account similarities in costs and other relevant factors.

regulation of cable programming services rates than for the basic service tier. While portions of the legislative history of Section 623(c) of the Communications Act evidence congressional views that only a minority of operators have egregiously high rates for cable programming services, they do not reveal an intent that our regulations may not identify rates above the competitive level as potentially unreasonable, even if they fall short of some standard of egregiousness.[947] Further, the statutory language describing rate regulation for basic and cable programming services, respectively, does not necessarily lead to different outcomes in application, in that the measure of the extent to which rates for cable programming services are excessive will be the difference between the challenged rate and the reasonable rate. Once this measure of unreasonableness is determined, we can order refunds and reduce rates to a "reasonable" level.[948]

389. Cable operators interpret the language of Section 623(c) to show a congressional intent that rates for cable programming services should trigger Commission action only if those rates are egregious. We conclude, however, that an equally justifiable reading of the statutory language, and one better supported by the legislative history, is that the language simply reflects the different procedural regulatory schemes Congress adopted for protecting consumers from excessive rates for basic and for cable programming services rather than different substantive standards. Basic rates are reviewed before they become effective; regulators are directed to assure that these rates will be reasonable. For cable programming services, however, rates are reviewed only after they have become effective. At that point the concern is to identify and reduce rates that are in place and not reasonable. Given that the Commission will be reviewing rates that are already in effect, it would make little sense to require the Commission to establish for cable programming services proactive standards designed to assure that rates are "reasonable." Accordingly, we reject arguments that we should adopt a bad actor standard to identify only the most excessive rates for cable programming services in

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[947] House Report at 86 (in discussing that most increases of rates for cable programming services have been reasonable, the Committee found that only "a minority of cable operators have abused their deregulated status and have unreasonably raised rates...In some cases...those rate increases have been egregious.") Id. See House Report at 68; and 138 Cong. Rec. S14224 (daily ed. Sept. 29, 1992) quoting Senator Inouye (the "bad actor" provision allows the Commission, on a case-by-case basis, to regulate rates for cable programming services, if it finds that they are "unreasonable.")

[948] Communications Act §623(c)(1)(C), 47 U.S.C. §543(c)(1)(C).

individual instances and rather will apply rate-setting standards grounded in the effective competition principles that Congress repeatedly emphasized throughout the legislative history of the Act.[949]

(2) Benchmarking versus Cost-of-Service

i. Background.

390. In the Notice we solicited comment on whether the Commission should adopt a regulatory approach based upon a benchmark or upon a cost-of-service methodology to govern rates for cable programming services.[950] We additionally included a price cap mechanism as a possible way to regulate rates for cable programming services. We tentatively concluded, as we did for basic service rate regulation, that traditional cost-of-service regulation would not be the best primary method to regulate the rates of cable programming services.[951]

ii. Comments.

391. Most commenters generally favor the same overall approach for regulation of cable programming service as for the basic service tier and for the same reasons. Thus, the majority of parties advocate a benchmark approach for the rate regulation

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[949] We also reject the view that because the factors enumerated in the statute are different for basic and for cable programming services, we must necessarily adopt different implementing standards for basic and cable programming services. Rather, we believe that we may adopt the same, or different, implementing standards as long as the standards we adopt meet statutory objectives and our standards for both tiers adequately take into account the respective statutory factors for each. The Cable Act of 1992 also permits the Commission to consider other relevant factors in establishing regulations governing cable programming services. We believe that our determinations concerning tier-neutrality are entitled to significant weight in establishing requirements for cable programming services. We believe that tier-neutrality outweighs other potentially conflicting statutory or other considerations that might warrant different rate standards for the basic and higher tiers. Thus, we choose to establish the same standards of reasonableness for the basic and cable programming service tiers.

[950] Notice, 8 FCC Rcd at 530-531, para. 92; see also id. at 519, para. 33.

[951] Notice, 8 FCC Rcd at 530-531, para. 92.

of cable programming services.[952] These parties point to various factors, such as administrative ease and pricing flexibility, as reasons why the Commission should adopt a benchmark for use as the primary rate regulatory methodology for cable programming services.[953] The parties that favor cost-of-service regulation of cable programming service rates argue that this approach will fulfill Congressional intent behind the Cable Act of 1992.[954] CFA strongly advocates the same cost-of-service approach to rate regulation of cable programming services as it does for basic service.[955] NJ recommends a formula that provides that the rate for cable programming service equals the actual cost of acquiring programming and transmission, less any revenues received, plus a reasonable profit, derived on a simple cost basis.[956]

iii. Discussion.

392. As for the basic service tier, we agree with the majority of parties in this proceeding that a cost-of-service methodology would not be the best primary method of regulating the rates for cable programming services.[957] We acknowledge that cost-of-service regulation, assiduously applied, has potential benefits: it can allow close supervision of rates and can readily be tailored to individual company circumstances. In theory, it can both allow companies the revenues needed to meet service demands and preclude monopoly profits. However, applying cost-of-service regulation to thousands of cable systems would impose tremendous administrative burdens on regulatory authorities and cable operators. Furthermore, cost-of-service regulation provides no incentive to cable operators to be

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[952] See, e.g. Cox Comments at 5 and 24-25; CIC Comments at 6; Carbondale Comments at 5-6; Conn Comments at 10; AEN Comments at 15-16.

[953] See, e.g. CIC Reply Comments at 21-22; Newhouse Comments at 42.; Continental Comments at 50-51.

[954] See, e.g. Minn Comments at 20-21; CFA Comments at 86; NJ Comments at 21.

[955] However, until the Commission can formulate such an approach, Consumer Federation of America recommends a benchmark type methodology, the "global formulaic" approach to rate regulation of cable programming services, as it does for basic services. CFA Comments at 86; see, e.g. Austin Reply Comments at 33-36.

[956] NJ Comments at 21.

[957] See, e.g. NCTA Comments at 58-59; Continental Comments, Appendix B at 1.

efficient, improve service and make cable service more attractive to consumers.[958] Based upon this balancing, we conclude that the disadvantages would clearly outweigh the advantages of cost-of-service regulation as the primary method for cable programming service rate regulation. In addition, we believe that a price cap will have the same advantages for regulation of cable programming services as for the basic service tier. Accordingly, we have determined that, as for the basic service tier, we should also incorporate a benchmark approach into our plan for regulation of cable programming services.

(3) Adoption and Application of the Benchmark and Price Cap for Cable Programming Services.

i. Background.

393. In the Notice, we proposed and solicited comment on the same approaches for cable programming services as for the basic service tier. Thus, we solicited comment on establishing for cable programming services several benchmark alternatives that define a zone of reasonableness above which rates for cable programming services would be presumptively unreasonable, and on a price cap alternative. We solicited comment on what individual system characteristics should be reflected in the regulatory scheme for cable programming services, and whether there should be annual adjustments to reflect increases in the general cost of doing business.

ii. Comments.

394. Commenters generally raised the same concerns about the proposed overall regulatory structure for cable programming services as for the benchmark for the basic service tier.[959] Thus, cable operators contend that there should be no cap on the ability of cable operators to raise rates for cable programming services, while many other parties contend that there should be such a cap.[960] Cable operators also offer various proposals as to what individual system characteristics should be reflected in the rate regulations, and urge that certain

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[958] See Notice, 8 FCC Rcd at 524, para. 58.

[959] See, e.g. Lifetime Comments at 6; NATOA Comments at 71; Schaumberg Comments at 7 and 10.

[960] See, e.g. Harron Comments at 13; Comcast Comments at 39; NATOA Comments at 70-71.

categories of costs should be treated as external to the cap or benchmark.[961]

395. The majority of commenters other than cable operators [962] recommend that the Commission adopt the same basis for determining the rate level for cable programming services, as for basic services.[963] Most cable operators, on the other hand, believe that the benchmark should reflect the "bad actor" standard for cable programming services and thus offer alternatives for the benchmark for cable programming services that would generally achieve a higher rate level for the benchmark for cable programming services.[964] Cable operators urge, for example, adoption of: 1)a benchmark based on current rates;[965] 2) a basket approach to setting a benchmark;[966] 3) an

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[961] See, e.g. Armstrong Comments at 30; Intermedia Comments at 29.

[962] However, there are some parties other than cable operators who support the adoption of a different benchmark for cable programming services than for basic service. For example, several municipalities advocate an approach that would use a benchmark based upon a comparison of similar second tier services in other communities where the cable operator is also franchised. BowlingGreen Comments at 24-26; Carson Comments at 24-26; Conneaut Comments at 24-27; Drexel Comments at 24-26; Keys Comments at 24-26; McKinney Comments at 24-27; NewBern Comments at 24-26; Paducah Comments at 25-27; Parsippany Comments at 24-27; Salisbury Comments at 24-27; St. Pete Comments at 26-28; Williamston Comments at 24-26.

[963] See, e.g. NATOA Comments at 70.

[964] See, e.g. Blade Comments at 7-8; Nashoba Comments at 100-103; and AdelphiaII Comments at 101-104.

[965] A benchmark based on current rates for cable programming services would be defined by examining the overall price for both basic and programming services, as well as the price for the installation, additional outlets and equipment rental. Adjustments would be made to the benchmark for inflation and the cost of capital. Additionally, the costs of retransmission consent, customer service and changes approved or mandated by franchise authorities would be incorporated directly into the cable programming services benchmark on a system specific basis. Furthermore, changes in costs that directly affect cable programming services, e.g. changes in costs of obtaining programming, and costs that account for rebuilds, upgrades and system expansion, including a reasonable profit on both, would be passed directly through the benchmark. Once such an adjustment is made it would become a permanent part of a cable operator's

outlier approach;[967] and 4) an annual survey of statutory factors

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benchmark for that system. Under this approach, the Commission would consider a variety of factors, such as the reasonableness of basic rates, the geography of the community, unusual franchise requirements and a reasonable return on capital costs, substantial increases in programming costs, costs associated with rebuilds and the costs of new services being provided to cable subscribers, in determining whether an above-benchmark rate for programming services is unreasonable. See, e.g. CIC Comments at 34-37 and 40; Cox Comments at 26, 29-31.

[966] A benchmark based upon a "basket" approach would consist of the following:

> the weighted average revenue per subscriber from all regulated tiers of service, including the basic service tier, plus the weighted average revenue from each subscriber for all regulated items of equipment, plus an amortized portion of installation fees, where the weights are either the number of subscribers to a tier of service or the number of units of an equipment item relative to the number of basic subscribers, divided by the subscriber-weighted number of channels.

This benchmark is expressed on a subscriber-channel per month basis. To identify systems with unreasonable rates, the Commission would distinguish rates that are unreasonably high from those that are high for reasons unrelated to the Cable Act of 1992, using the same process of statistical identification of factors that explain rate variation described in connection with basic service. See paras. As with basic service, some of the factors could be used to form a grid, into a cell of which each system would fall. The benchmark standard would single out systems with the highest statistical unexplained average subscriber revenues as presumptively unreasonable; the remaining systems would be regarded as having reasonable cable programming service rates. The cable programming services benchmark would be adjusted annually based on changes in the median rates of regulated systems. The Commission would not limit the increases in the rates for programming services, i.e. create a price cap, as long as the benchmark is not violated. See, e.g. AdelphiaII Comments at 104; Nashoba Comments at 103; Falcon Comments at 60-61 and 68; Newhouse Comments at 42; NCTA Comments at 60-61 and Attachment at 25-26.

[967] This approach would require the Commission to determine rates for cable programming services on the basis of aggregate rates for basic service and cable programming service, including expanded basic service and unregulated equipment. Through a sampling process, the Commission would survey the relevant prices on a per channel basis within system categories and identify a